

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMED, WALID  
MUHAMMAD SALIH MUBARAK BIN  
'ATTASH, RAMZI BIN AL SHIBH, ALI  
ABDUL AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI  
(RAMZI BIN AL SHIBH)

**Defense Motion  
To Compel Discovery**

**(JTF Medical Records, Test Results)**

31 Dec 2008

1. **Timeliness:** This Motion is timely filed within the rules prescribed for military commissions.
2. **Relief Sought:** On behalf of Mr. Ramzi bin al Shibh, the defense seeks to compel, again, discovery of the medical examinations, tests, results and reports performed on Mr. bin al Shibh while he was in the custody of the Joint Task Force-Guantanamo (JTF-GTMO). The defense further moves to compel production of contact information for the physicians and technicians who conducted such examinations, tests, and those who produced such results and reports. In addition, the defense seeks production of all additional medical records generated during Mr. bin al Shibh's time in the custody of JTF-GTMO, as this Commission previously ordered on 25 June 2008.

3. **Overview:**

The government has furnished detailed counsel with a portion of medical records generated since Mr. bin al Shibh has been in the custody of the Department of Defense (DOD). The medical records generated during this period in DOD custody were ordered to be produced to detailed defense counsel in June 2008. The government only produced doctors' orders for medications and tests, and psychiatric records. The doctors' orders and psychiatric records

reference certain tests performed on Mr. bin al Shibh, but those tests results and the readings of them from the relevant specialists were not provided to the defense.

The Rules for Military Commission could not be more clear: upon request (as the defense made here as early as May 2008), the defense is entitled to access “Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense.” R.M.C. 701. This discovery is material to the defense’s preparation of the RMC 909 hearing. Since, in addition to the rules that require their production, this Commission also *ordered* (in June 2008) production these very medical records, the defense is entitled to this discovery. Absent production of the complete medical records, as ordered, the defense will be unable to adequately prepare for the RMC 909 hearing, and counsel will therefore be ineffective in their assistance to Mr. bin al Shibh’s defense. This Commission has authority to grant a continuance due to the government’s failure to abide by discovery obligations mandated in the rules. *See* RMC 701(1)(3).

**4. Burden and Standard of Proof:** As the moving party, the defense bears the burden of proof on any question of fact; this burden is met by a showing of a preponderance of evidence. *See* R.M.C. 905(c). Where the discovery at issue already has been ordered produced, , as it has here, the burden is on the party failing to comply with the order (here, the Government) to demonstrate why it has not produced the ordered records. *Cf.* R.M.C. 701(1)(3)(“Regulation of discovery”).

**5. Facts:**

a. Mr. bin al Shibh, was arrested on [REDACTED]. He was placed in the custody

of the DOD on or about 6 September 2006.

b. On 25 June 2008, this Commission ordered Joint Task Force Guantanamo to provide the Prosecution, for release to the Defense, “any and all medical records related to Mr. bin al Shibh.” *See* Ruling in D-010 and D-011.

c. Over a period of months, the government provided JTF-GTMO records covering the period from September 2006, when Mr. bin al Shibh first arrived at Guantanamo, to 21 October 2008. The defense has not received records covering the period from that date in October until the present.

d. According to the discovery the defense has been able to review, Mr. bin al Shibh was been [REDACTED]

e. This discovery also indicates that certain medical tests were performed on Mr. bin al Shibh. [REDACTED]

f. An interview with a physician, Dr. A<sup>1</sup>, who examined Mr. bin al Shibh, the defense learned that Dr. A was provided a summary of medical information generated before Mr. bin al Shibh arrived at Guantanamo. The defense has not been provided this summary.

## **6. Law and Argument:**

### **a. The Disclosure of this Evidence Having Been Ordered, the Evidence Must be Produced to the Defense.**

“Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j; *see also*, Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as

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<sup>1</sup> Pursuant to the government’s imposed rules, personnel from JTF-GTMO who were involved in Mr. bin al Shibh’s treatment are designated by alphabetical letters, instead of their names.

provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”). Under Rule for Military Commission 701(c)(1), the government must permit the defense to examine documents and items “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel.” *See* R.M.C. 701(c)(1). Military case law upholds the notion, moreover, that “access alone is not enough: the defendant has the right to present legally and logically relevant evidence at trial.” *United States v. Woolheater*, 40 M.J. 170, 173 (C.A.A.F. 1994), *citing Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). When an order is in place to produce discovery to the defense, the defense has met the low threshold showing for the materiality of the discovery in question. *See United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993)(“materiality standard is not a heavy burden”) (internal quotations omitted). Where a party fails to comply with discovery rule RMC 701, the Military Judge may grant a continuance, or enter such order as is just under the circumstances. *See* R.M.C. 701(l)(3).

The discovery at issue here was ordered produced six months ago. It goes without saying that the government has an on-going obligation to produce discovery. *See* R.M.C. 701(i)(“If a party discovery . . . additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party . . . of the existence of the additional evidence or material.”) The government has not complied with its on-going obligation. The government has not acknowledged the presence of the discovery sought here, and this discovery consists of information that is patently within the government’s obligation (both under the Rule and in accordance with this Commission’s order) to produce. The discovery at issue is clearly within

the possession of the government. The government had a full opportunity to learn of its existence in the six months since the June order for production, if not before.

It is important to note that the discovery in question here involves medical information. It is also important to note that the government finally produced other medical records to the defense at 1300 on 24 December 2008.<sup>2</sup> Detailed counsel are just beginning to review this latter discovery, and would need additional time, once the discovery at issue here is produced, to consult with a professional regarding the test results and other records. *See United States v. Montgomery*, 56 M.J. 660, 665 (A.C.C.A. 2001)(Military judge abused his discretion because a continuance was warranted to allow defense time to investigate information in social work records).

#### **b. Conclusion**

The defense merely seeks to have the government comply with its statutory, regulatory and professional discovery obligations, in light of the patently discoverable nature of the information requested, and the existence of a Commission order requiring production. The medical records must be produced in their entirety, including test results and contact information for personnel who read the tests so that the defense may properly prepare for the competency hearing.

**7. Request for Oral Argument:** The defense respectfully requests oral argument on this motion.

Respectfully submitted,

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<sup>2</sup> Since this 24 December 2008 discovery production consisted of some classified documents, the government's rules required the defense to physically retrieve the evidence from the Commission Senior Security Advisor. As detailed counsel were on leave on 24 December, the defense was not able actually to obtain the documents until 29 December 2008, after the federally-granted holiday period.

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UNITED STATES OF AMERICA	)	
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v.	)	PROSECUTION RESPONSE
	)	
	)	To Defense Motion to Compel Discovery
	)	(JTF Medical Records, Test Results)
	)	(Ramzi Bin al Shibh)
KHALID SHEIKH MOHAMMED,	)	
WALID MUHAMMAD SALIH MUBARAK	)	
BIN ATTASH,	)	
RAMZI BINALSHIBH,	)	
ALI ABDUL AZIZ ALI,	)	
MUSTAFA AHMED ADAM AL HAWSAWI	)	
	)	7 January 2009

1. **Timeliness:** This Response is timely filed.

2. **Relief Requested:** The Prosecution respectfully requests that the Commission deny the Defense Motion to Compel Discovery: JTF Medical Records, Test Results. The Prosecution believes it has previously produced the requested records.

3. **Burden of Proof:** As the moving party, the Defense bears the burden of persuasion. *See*, Rule for Military Commissions (RMC) 905(c). The Prosecution has complied and intends to comply with all of its discovery obligations, therefore the Defense retains the burden of persuasion on why the information it seeks is required for the pending RMC 909 hearing.

4. **Facts:**

- i. On 1 July 2008, the Military Judge ordered a board be convened pursuant to RMC 706 to inquire into the mental capacity of the accused.

- ii. On 16 July 2008, the Prosecution provided 503 pages of discovery to the Defense consisting of the JTF medical records of the accused.
- iii. From August 2008 through the present, the Defense has filed numerous motions seeking discovery and access to potential witnesses for the upcoming RMC 909 hearing.
- iv. On 19 December 2008, the Commission scheduled the RMC 909 hearing on 19-21 January 2009.
- v. On 24 December 2008 the Prosecution provided 754 pages of discovery consisting of the updated JTF medical records of the accused through 1 December 2008 as well as the defense-requested DIMS records.
- vi. On 31 December 2008 (after the close of business) the Defense filed the instant Motion to Compel.

5. **Discussion:**

a. In the most recent Defense Motion to Compel Medical Records of the accused, the Defense alleges that the Government has not complied with its on-going obligation and has not acknowledged the presence of the discovery sought. Specifically, the Defense claims that the discovery provided by the Government did not include certain

[REDACTED]

[REDACTED]

b. On 31 December 2008 the Defense filed the instant Motion to Compel complaining that they would need additional time to consult with professionals regarding [REDACTED] less than three weeks before the scheduled RMC 909 hearing. The Prosecution regrets that the Defense has apparently waited until such a late date to review discovery it believes was provided in June 2008. Upon receiving this motion the Prosecution was able to quickly review its discovery to determine that it believes the requested items had already been provided to the Defense. Upon Defense request, the



Prosecution sought, and believes it received, the entire medical record of the accused from JTF-GTMO and has provided what it received, in toto<sup>1</sup>, to the Defense. The Prosecution notes that a simple phone call from the Defense regarding this issue may have saved the parties significant time and obviated the need for yet another Motion to Compel.

c. The Prosecution has discovered the following pages of medical records that it believes matches the descriptions of the items sought, [REDACTED]

[REDACTED]

i. [REDACTED]

ii. [REDACTED]

iii. [REDACTED]

iv. [REDACTED]

[REDACTED]

v. [REDACTED]

vi. RBS MED00000880 Summary matching description by Dr. A.

d. The Prosecution would also note that, contrary to the Defense assertions, the most recent medical records provided to the Defense date to 1 December 2008, and not 21 October 2008, as set forth by the Defense in its motion. In the course of a hearing that is continued over a six month period there will always be some lag-time before the Defense gets updated medical records, and the Defense will have the accused's updated medical records (if any) from 1 December to the present prior to the hearing.

6. **Oral Argument:** The Prosecution does not request oral argument.

7. **Witnesses:** None.

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<sup>1</sup> With the exceptions of redactions the Prosecution made to protect identities of personnel.

8. **Attachments:** None.

9. **Respectfully Submitted by:**

Clay Trivett  
Prosecutor

By: \_\_\_\_\_/S/\_\_\_\_\_.  
Joanna Baltes  
Prosecutor